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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-201776

DATE: June 17, 1981

MATTER OF: Larrie L. Rochholz-Retroactive promotion
and backpay

DIGEST: Former Veterans Administration employee claims retroactive promotion with backpay alleging a wrongful denial of promotion based on agency failure to follow nondiscretionary regulations and policies. Claim for retroactive promotion is denied since granting of promotion is a discretionary matter primarily within the province of the administrative agency involved and record fails to show the existence of a nondiscretionary agency policy or regulation which would require that he be promoted. Also, there was no final approval of action to establish and classify position at higher grade. Even if position was erroneously classified, any remedy would have been prospective only upon formal classification appeal.

This decision denies a [claim for a retroactive promotion with backpay] requested by Mr. Larrie L. Rochholz, and sustains our Claims Group denial of December 5, 1980 (Z-2824999).

Mr. Rochholz's claim was received in this Office on August 26, 1980; therefore, the period prior to August 26, 1974, is precluded from our consideration as it is time barred. 31 U.S.C. § 71a (1976). Mr. Rochholz states that between 1970 and 1977 he was assigned higher level duties outside his regular position as a GS-11 Management Analyst with the Veterans Administration (VA) Medical Center (Hospital), Fresno, California. During the period April 1974 through March 1976, the Hospital Director sought to have him promoted to grade GS-12 in such positions as Management Analyst and Administrative Officer. Desk audits of Mr. Rochholz's duties convinced the Hospital personnel office that the higher grade was warranted.

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However, the VA Central Office denied the requests. In December 1976, for example, it informed the Director that under job classification standards a classification above grade GS-11 could not be supported. It advised the Director in May 1977 that he should seek to justify an Assistant Director position rather than an Administrative Assistant.

Mr. Rochholz states that his agency violated non-discretionary regulations and policies and that he should have been promoted by the VA during the period in question. His main contention is contained in his letter to our Claims Group of August 18, 1980. He says that: "The basic point of this claim is that the VA Central Office violated both Civil Service and VA regulations during this period of time and that I would have been promoted but for their unjustified and unwarranted failure to act in a timely and proper manner." In support of his contention that he should be granted a retroactive promotion and backpay, he cites to decisions of this Office, particularly 55 Comp. Gen. 1311 (1976); Billy M. Medaugh, 55 Comp. Gen. 1443 (1976); Mildred J. Zaker and Community Services Administration, B-180010, August 30, 1976.

It is a well-stated rule that the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. Tierney v. United States, 168 Ct.Cl. 77 (1964); Wienberg v. United States, 192 Ct. Cl. 24 (1970).

Moreover, an administrative change in salary may not be made retroactively effective in the absence of specific statutory authority. This Office has permitted retroactive promotions in cases where through an administrative or clerical error a personnel action was not effected as originally intended, where an agency has failed to carry out nondiscretionary regulations or policies, where an administrative error has deprived the employee of a right granted by statute or regulation or where the agency has through a collective bargaining agreement vested in the employee the right to be promoted after a specified period of time. Ruth Wilson, 55 Comp. Gen. 836 (1976); William Scott, B-182565, May 29, 1975.

The Comptroller General decisions cited by Mr. Rochholz in support of his claim are exceptions to the general rule as outlined above. However, Mr. Rochholz has not submitted any evidence to establish that his case falls within any of the above exceptions. There is nothing in the record which shows the existence of a nondiscretionary agency policy or regulation which would require that he be promoted. See Earl H. Carter, B-196638, July 10, 1980. Mr. Rochholz does refer to Federal Personnel Manual regulations concerning the classification of positions. However, the cited regulations do not mandate nondiscretionary promotion. The Classification Act of 1949, now codified in 5 U.S.C. § 5101 et seq., governs classification of Federal positions in the General Schedule. Under the statute and implementing regulations in 5 C.F.R. § 511.101 et seq., the employee's agency and the Civil Service Commission (now Office of Personnel Management) are primarily responsible for the classification of duties of the employee's position. With one exception not pertinent here classification actions may not be made retroactive under civil service regulations. Also, the Supreme Court held in United States v. Testan, 424 U.S. 392 (1976), that neither the Classification Act nor the Back Pay Act, 5 U.S.C. § 5596 (1976), creates a substantive right to backpay for a period of wrongful position classification. George A. Jackson, B-188617, September 20, 1977.

Although the Fresno Hospital personnel office initially classified Mr. Rochholz's position at grade GS-12 and believed it should have been established, final approval was not obtained from the VA Central Office. Consequently, the position could not be considered classified and established for the purpose of awarding backpay at grade level GS-12. See Roger F. Dierking, B-195656, December 10, 1979. Even if the position was erroneously classified, any remedy would have been prospective only, after Mr. Rochholz formally appealed the classification and the VA or the Civil Service Commission decided in his favor. United States v. Testan, supra.

Accordingly, our Claims Group's disallowance of December 5, 1980, Z-2824999, is sustained.


Acting Comptroller General
of the United States